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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 18

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 696.

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

OPINION BELOW.

The opinion of the Ohio Supreme Court (R. 15-26) is reported at 175 Ohio St. 73, 191 N. E. 2d 825 (1963).

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on June 26, 1963 (R. 16).

Petition for a writ of certiorari was filed December 23, 1963 and was granted February 17, 1964. 376 U. S. 905 (1964).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

INTEREST OF AMICI.

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, are organizations dedicated to the preservation and extension of civil liberties, and particularly the freedoms protected by the United States Constitution.

This brief of *amici curiae* is filed because it appears to us that the warrantless arrest and search which led to the conviction of the accused in this case—a conviction which flowed directly from the denial of a timely motion to suppress the evidence so obtained—collides violently with the federal constitutional standards to which state criminal procedure is obliged to conform. *Ker v. California*, 374 U. S. 23 (1963); *Mapp v. Ohio*, 367 U. S. 643 (1961).

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of the law of search and seizure with which all law enforcement officials, federal, or state, high or petty, must unswervingly comply, and in the hope that in some measure it may be of assistance to the Court in performing its delicate task of weighing "the social need that crime shall be repressed" [1] against "the social need that the law will not be flouted by the insolence of office," [2] this brief is filed.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

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[1] Mr. Justice Cardozo, in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

[2] *Ibid.*

QUESTIONS PRESENTED.

I.

In the absence of an emergency, and where the police had ample opportunity to procure a search warrant but failed to do so, is a warrantless search of the person of the accused *per se* unreasonable within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

II.

Did the arresting officer, whose only basis for a warrantless arrest and search was a police photograph of the accused, a record of three previous arrests for the same offense, and a tip from an unidentified informer, have probable cause sufficient to obviate the necessity of procuring a search warrant within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

III.

Is a warrantless arrest under a state statute which provides that a police officer may arrest without a warrant a person "found violating" state or municipal law invalid under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution where the contraband, possession of which is the gravamen of the offense charged, was completely concealed from the view of the arresting officer and was discovered only after a complete search of the clothing of the accused?

IV.

Where the sole issue at a hearing on a motion to suppress evidence is whether the arresting officer had probable cause to arrest and search the accused, do the Fourth,

Fifth and Fourteenth Amendments to the United States Constitution require that the arresting officer be compelled to disclose the identity of the informant whose tip resulted in such arrest and search, where the only other evidence showing probable cause in the arresting officer prior to the arrest and search were a police photograph and knowledge of three previous arrests of the accused?

STATEMENT OF THE CASE.

Petitioner, William Beck, was charged in the Cleveland Municipal Court with possession of clearing house slips under Ohio Revised Code Section 2915.111. (R. 1-2) Prior to the trial, petitioner filed a motion to suppress as evidence the clearing house slips which were taken from his person during a police search. (R. 3-4)

At the hearing on the motion to suppress, the only witness was the police officer who arrested the petitioner. He testified that, armed with a police photograph of the petitioner, knowledge of three previous arrests for clearing house operations and a tip from an informer whose identity he refused to reveal, he left the police station during daylight hours with the express purpose of arresting petitioner and "had in mind looking for [petitioner] in the area of 115th Street and Beulah." (R. 5-10)

The officer conceded that he had neither an arrest nor a search warrant (R. 8-9), although at the time he left the police station he fully intended to arrest petitioner. (R. 9) He admitted that the clerk's office, which was in the same building as the police station, and from which a warrant could have been sought, was open for business when he left the station. (R. 9) He explained his failure to seek a warrant as follows:

> "I couldn't get one under those conditions." (R. 9)

Shortly before 1:00 p. m. he saw petitioner driving an automobile on East 115th Street. The officer admitted that petitioner was driving lawfully. (R. 5)

The arresting officer and other policemen identified themselves and asked petitioner to pull over to the curb. (R. 6) When petitioner stopped, the officers searched the car. (R. 6) During the search of the automobile, petitioner was placed under arrest "for a clearing house operation, scheme of chance" and, when the search disclosed nothing, petitioner was taken to the police station. (R. 6) His person was searched and the clearing house slips were found "beneath the sock of [sic] his leg." (R. 7)

Attempts by defense counsel to compel the disclosure of the identity of the informer whose tip was instrumental in the arrest were frustrated by the trial court. (R. 10-11) Although the prosecutor urged that the identity of the informer was privileged, and defense counsel asserted his right to identify the informer in order to cross-examine as to his reliability and test the issue of probable cause, the court refused to compel the officer to identify the informer "on the grounds of irrelevancy." (R. 11) No testimony was offered as to the credibility of the informer, the previous reliability of his information, or other corroborating facts.

The motion to suppress was overruled. (R. 12) Petitioner stipulated that the facts upon trial would be essentially the same as the evidence elicited on the motion to suppress, and, on the basis of such testimony and the clearing house slips which had been introduced into evidence, he was found guilty as charged. (R. 12) The Court of Appeals of Cuyahoga County and the Ohio Supreme Court affirmed the conviction. It is these adverse decisions from which relief is sought here.

SUMMARY OF ARGUMENT.

The conviction of the accused on the basis of evidence obtained from a warrantless search of his person following a warrantless arrest raises grave constitutional problems involving the substantive law of arrest and search and seizure.

Amici contend

I. that, whether or not the warrantless arrest was invalid, the failure of the arresting officer to procure either an arrest or search warrant when there was ample opportunity to have sought one from a magistrate invalidates the search of the person which yielded the evidence upon which the accused was convicted.

II and III. that the arrest without a warrant was invalid, both

(A) because there was no showing of probable cause sufficient to satisfy the requirements of the Fourth and Fourteenth Amendments to arrest the accused, and

(B) Because the state statute employed to validate the arrest, as interpreted by the state court of last resort, does not meet the minimum federal constitutional requirements embodied in the Fourth, and Fourteenth Amendments to the United States Constitution.

IV. that whether or not the warrantless arrest was invalid, the refusal of the trial court at the hearing on the motion to suppress to permit defense counsel to probe the identity and reliability of the informer whose tip was responsible for the arrest, was itself in violation of the Fourth, Fifth and Fourteenth Amendments because

(A) it prevented exploration of the probable cause requirement embodied in the Fourth Amendment as applied to the states through the Fourteenth Amendment;

(B) it shifted the burden of establishing the validity of the arrest and search from the prosecution where it rightfully belongs; and

(C) it violated the concept of fundamental fairness protected by the due process clause of the Fourteenth Amendment.

ARGUMENT.

I.

The ingenious use by the Cleveland Police of a warrantless arrest to justify a warrantless search, with further justification of both by the contraband yield of the search so made, is alarming, the more so because all of the courts in the State of Ohio that have reviewed this police action have given it judicial sanction.

The principle that law enforcement officials are required by the Fourth Amendment to seek a warrant for an arrest and search except upon a showing of *urgent necessity* [3] has been too frequently ignored by the police, unfortunately, in many instances, with judicial acquiescence.

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[3] See *McDonald v. United States*, 335 U. S. 451, 455 (1948), for a general statement of the rule and its rationale: "[The Fourth Amendment] guarantee of protection against unreasonable searches and seizures * * *, *with few exceptions*, stays the hand of the police *unless they have a search warrant* issued by a magistrate on probable cause supported by oath or affirmation. * * * We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency*, the Fourth Amendment has interposed a magistrate between the citizen and the police. * * * It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. * * * We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" (Emphasis added.)

The rule requiring a warrant has been, in large measure, eaten away by the corrosive exceptions which have been engrafted upon it. This circumvention of the requirements of the Fourth Amendment stems in large measure from the unfortunate[4] decision of this Court in *United States v. Rabinowitz*, 339 U. S. 56 (1950), which substituted the test of "reasonableness" of a search for the requirement of a warrant. But even in *Rabinowitz*, a magistrate had an opportunity to examine the facts alleged to demonstrate probable cause before the arrest because there the search was an incident of an arrest based upon a *valid warrant*. In the present case, a judicial officer never had an opportunity to judge the question of probable cause because the police justified their warrantless search of the person of the accused by an arrest which was also without a warrant. And their cynical disregard for the constitutional command to procure a warrant is best demonstrated by the facts in the instant case: the arresting officer left the police station during business hours of the court. Magistrates were available nearby to hear his application for a warrant of arrest or search had he elected to seek one. There was no particular urgency about arriving at the place of arrest, nor could he have known that the accused would be found in an automobile. As a matter of fact, the arresting officer knew that in advance of

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[4] See Frankfurter, J., dissenting in *United States v. Rabinowitz*, 339 U. S. 56, at 83-84:

> "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant. * * * It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable. * * * [T]he presence or absence of an ample opportunity for getting a search warrant [is] very important. It is not a rule of thumb. It is a rule of the Fourth Amendment."

the arrest he did not have sufficient information to obtain a warrant from a magistrate. Instead, at 1:00 p. m., he stopped the accused while driving lawfully on a public street on the basis of no more information than he could have presented to a magistrate before he left the police station.

So long as policemen are permitted the alternative of making arrests and searches without a warrant, it is apparent that they will not voluntarily seek them. Why should they apply for a warrant in which they must describe the place to be searched and the articles to be seized with particularity when they can arrest the suspect, conduct a general and roving search which a magistrate would never permit them by warrant and perhaps turn up some incriminating evidence which would justify the arrest *ab initio*? But such an approach, while efficient from the law officer's viewpoint, cannot be constitutionally justified on such grounds.[5]

The warrant which the Fourth Amendment so explicitly describes as a constitutional necessity is not "merely a requirement for a piece of paper." [6] This Court has had occasion to comment on the importance of the warrant in a free society most recently in *Aguilar v. Texas*, __ U. S. __, 84 S. Ct. 1509 (1964):

> "An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed

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[5] See *McDonald v. United States*, 335 U. S. 451, 454-455 (1948), in which Justice Douglas speaking for the Court, said: "[T]here must be compelling reasons to justify the absence of a search warrant. * * * No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement. * * *".

[6] *United States v. Rabinowitz*, 339 U. S. 56, 60 (1950) (dissenting opinion).

and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests.' *United States v. Lefkowitz*, 285 U. S. 452, 464. The reasons for this rule go to the foundations of the Fourth Amendment. A contrary rule 'that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' *Johnson v. United States*, 333 U. S. 10, 14. Under such a rule 'resort to [warrants] would ultimately be discouraged.' *Jones v. United States*, 362 U. S. 257, 270. * * *

"* * * As so well stated by Mr. Justice Jackson:

'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States, supra*, at 13-14."

Both before and since the holding in *Rabinowitz*, this Court has on a number of occasions pointed out that policemen are *not* permitted to make their own choice as to whether or not they will procure a warrant before making an arrest and search—that where urgent necessity to arrest and search are not present and it is practicable to procure a warrant, an arrest or search without one will be constitutionally defective, even where the officers had the requisite factual knowledge to constitute probable cause.

Chapman v. United States, 365 U. S. 610, 613 (1961); *McDonald v. United States*, 335 U. S. 451 (1948); *Johnson v. United States*, 333 U. S. 10 (1947); *Taylor v. United States*, 286 U. S. 1 (1932); *Agnello v. United States*, 269 U. S. 20, 33 (1925); *Weeks v. United States*, 232 U. S. 383 (1914). And see *Trupiano v. United States*, 334 U. S. 699 (1948), overruled on this point two years later in *Rabinowitz*.[7] It is true that the search of stationary premises was primarily in issue in these cases, while in the instant case the person of the accused was searched after being apprehended in an automobile; but the imperatives of the Fourth Amendment apply to searches and seizures of persons as well as the search of their houses, *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955), and their mere presence in an automobile does not deprive them of the immunity from search of the person to which they would otherwise be entitled, *United States v. Di Re*, 332 U. S. 581, 587 (1948).

It cannot be denied that the integrity of the person is at least as legitimate an area of privacy to be constitutionally protected as the drawers in his house. Cf. *Rochin v. California*, 342 U. S. 165 (1952); *United States v. Townsend*, 151 F. Supp. 378 (D. D. C. 1957); *Breithaupt v. Abram*, 352 U. S. 432 (1957).

Nor can it be validly contended here that the search of the person was necessary or incidental to protect the arrest, or the lives of the arresting officers, for two reasons: (1) there is no right to protect an arrest which is itself invalid; and (2) the accused was already in custody and the arrest was secure before the search of the

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[7] See the dry observation of Mr. Justice Black in *Rabinowitz*: "In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule * * * at least long enough to see how it works." 339 U. S. at 67 (dissenting opinion).

person was commenced. Cf. *Preston v. United States* -- U. S. --, 84 S. Ct. 881 (1964). (After suspects are in custody, there is no excuse for a roving search for weapons.)

The instant case provides a clear illustration of a situation where a law enforcement officer had ample opportunity and time to procure a warrant in advance of an arrest and search, but failed or refused to do so. It should stimulate this Court to re-examine the broad exceptions which have emasculated the general rule that a warrant is an imperative of the Fourth Amendment, to limit these exceptions to the most stark police necessity, and to reaffirm the principle that, whether or not a search is incident to a valid arrest, "law enforcement agents must secure and use search warrants wherever reasonably practicable." *Trupiano v. United States, supra.* And such a rule is particularly compelling where, as here, the arrest was made without a warrant for a crime not committed in the presence of the arresting officer.

II and III.

While there was some question as to which of two Ohio statutes[8] were used to justify the arrest of the accused without a warrant in this case, the circumstances of the arrest here did not comply with the minimum federal

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[8] The majority of the Ohio Supreme Court found that the accused was arrested for a *felony*, which under Ohio Rev. Code, Section 2935.04 requires a showing of "reasonable ground to believe that a felony has been committed" and "reasonable cause to believe" the accused "is guilty of the offense" in order to justify a warrantless arrest; the minority felt that he was arrested for a *misdemeanor*, which, in order to validate an arrest without a warrant, requires that the accused be "found violating a law. * * *" Ohio Rev. Code, Section 2935.03. See majority opinion, *State v. Beck*, 175 Ohio St. 74, 75 (1963) and dissenting opinion, 175 Ohio St. at 81.

standards of arrest contained in the Fourth Amendment to the United States Constitution.[9]

In view of the historical context in which the Fourth Amendment language was forged and its express language which delineates protections against unreasonable "seizures" of "persons" as well as "searches" of "houses, papers and effects," it seems clear that the constitutional requirement of a warrant based upon probable cause is as applicable to arrests of the person as to searches of premises. "The [Fourth] Amendment protects the people against the seizure of their persons as well as against the search of their houses." *Wrightson v. United States*, 222 F. 2d 556, 559 (D. C. Cir. 1955). This Court has so held. *Henry v. United States*, 361 U. S. 98, 100 (1959); *McGrain v. Daugherty*, 273 U. S. 135, 156 (1927); *Albrecht v. United States*, 273 U. S. 1, 5 (1927); and see *Cochran v. United States*, 291 F. 2d 633, 634 (8th Cir. 1961). It follows ineluctably that the extension of the commands of the Fourth Amendment to the states by *Mapp v. Ohio*, 367 U. S. 643 (1961) as to searches applies equally to the law of arrest, although it is clear that a state may fashion statutory requirements for a warrantless arrest which exceed the minimum federal constitutional standard if it should desire to do so, and the constitutional validity of an incidental search will then be determined by the higher state standard. *United States v. Di Re*, 332 U. S. 581 (1948).

If the warrantless arrest was made pursuant to Sec-

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[9] "The right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable *searches* and *seizures*, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be *seized*." U. S. Const. Amend. IV. (Emphasis supplied.)

tion 2935.04 Ohio Revised Code,[10] the express language of the statute, as well as the command of the federal constitution, requires a showing of probable cause prior to the warrantless arrest. If the arrest was made on the basis of Section 2935.03 Ohio Revised Code,[11] the statute, to be applied to the instant facts, must be interpreted to permit a warrantless arrest in the absence of probable cause, merely upon a showing that the accused had upon his person, concealed from the arresting officer's view, contraband, possession of which was an offense under Ohio law.[12] And such an interpretation by the state court of last resort[13] would invalidate the statute and the arrest as repugnant to federal constitutional standards.

In either event, unless it can be shown that the ar-

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[10] "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another *whom he has reasonable cause to believe is guilty of the offense.* * * *" (Emphasis supplied.)

[11] "A * * * police officer shall arrest and detain a person *found violating a law of this state, or an ordinance of a municipal corporation.* * * *" (Emphasis supplied.)

[12] Such an interpretation, while necessary to uphold the validity of the arrest here, has neither factual basis nor logic to commend it. See dissenting opinion of Gibson, J., below, 175 Ohio St. at 81-82:

> "* * * for a misdemeanor to be committed in the presence of an officer, the facts or elements constituting the offense must be *revealed* in the presence of the officer and the officer must *perceive* that the offense is being committed * * *.
>
> "* * * The violation of law occurring at the time of the defendant's arrest here, however, consisted solely of his having custody * * * of a packet of clearinghouse slips under his sock and inside his trousers. * * * In my opinion, * * * the defendant was not '*found* violating a law of this state' by the officer * * *."

[13] The construction of a statute by the highest court of a state fixes its meaning for the purpose of considering its constitutional validity. *Winters v. New York*, 333 U. S. 507, 514 (1948).

resting officer, prior to the arrest of the petitioner, had probable cause to believe that the accused was guilty of an offense, the arrest is invalid, and the fruits of the search of his person made incidental thereto must be suppressed.[14]

While evidence necessary to establish guilt is not required to demonstrate probable cause,[15] the mere good faith of the arresting officers is insufficient.[16] "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." [17]

Prior to the detention of the accused,[18] the arresting officer knew, as a matter of personal knowledge, only of petitioner's three prior arrests for clearinghouse operations. Whatever information he had about the *current* criminal activity of the accused came exclusively from a tip from an unidentified informer, whose credibility and previous record for giving reliable information were neither established nor disclosed by the prosecution.

Informer testimony alone can never be sufficient to constitute probable cause. *Cochran v. United States*, 291 F. 2d 633 (8th Cir. 1961). "An uncorroborated tip by an

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[14] *Henry v. United States*, 361 U. S. 98, 102 (1959); *Johnson v. United States*, 333 U. S. 10, 15 (1947).

[15] *Brinegar v. United States*, 338 U. S. 160 (1949).

[16] *Henry v. United States*, 361 U. S. 98, 102 (1959).

[17] *Ibid.*

[18] When the liberty of movement of the accused was first restricted by his being hailed to the curb by police, he was under arrest for purposes of determining the existence of probable cause, regardless of when the police say he was arrested. *Henry v. United States*, 361 U. S. 98, 103 (1959). But placing the arrest *after* the fruitless search of the car provides scant comfort to the arresting officer in his attempt to justify the arrest; it merely adds an additional piece of knowledge to the arresting officer's barren arsenal of information: awareness of the *lack of incriminating evidence* in the vehicle the accused was driving.

informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest." *Contee v. United States*, 215 F. 2d 324, 327 (D. C. Cir. 1954). Unless the record demonstrates additional corroborative evidence within the personal knowledge of the arresting officers—knowledge either of the facts concerning guilt or of the reliability of the informer's information—the information can convey to the arresting officer no more than "mere suspicion" and an essential ingredient of probable cause is lacking. *Jones v. United States*, 362 U. S. 257 (1960); *Draper v. United States*, 358 U. S. 307 (1959). "In testing the sufficiency of probable cause for an officer's [arrest] without a warrant [this Court] has held that he may rely upon information received through an informant rather than upon his direct observations, *so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.*" *Jones v. United States, supra*, at 269. This Court's insistence upon "facts within the knowledge of the [arresting officer]" as a necessary element of probable cause is a thread that runs consistently through the fabric of the decided cases. *Director General v. Kastenbaum*, 263 U. S. 25, 28 (1923); *Stacey v. Emery*, 97 U. S. 642, 645 (1878). It will not do to find, as the court below did,[19] that such direct knowledge of facts corroborating the informer's tip flows from the mere fact that the accused was actually found in the general locality where the informer said he would be, *so long as the behavior of the accused when*

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[19] "* * * Information was given to the police by an informer that defendant would be in a certain locality at a certain time *pursuing his unlawful activities*. He was found in that locality, as predicted, *driving an automobile*. * * * [O]fficers sometimes base a part of their activities on information supplied them by informers, and *the only way to verify the reliability of such information is to make use thereof.*" *State v. Beck*, 175 Ohio St. 73, 74, 76 (1963). (Emphasis supplied.)

apprehended was innocuous. Acts which are "outwardly innocent" cannot constitute that factual knowledge which is essential to probable cause. *Henry v. United States,* 361 U. S. 98, 103 (1959). Nor is the fact that the arresting officer knew of previous arrests of the accused for similar offenses an independent piece of information bearing on the question of whether he was guilty of an offense *at the time of the arrest,* despite the reliance placed upon this item of policeman's knowledge by the court below.[20] Else an accused with a prior criminal record could never be the subject of an illegal arrest.

Apart from these, the record in this case is barren of any other fact, substantial or insignificant, upon which may be predicated probable cause to arrest the accused without a warrant while he was driving an automobile lawfully, in daylight hours, on a public street where he had a perfect right to be. But for the contraband yielded by the search of the person of the accused which formed the basis of his conviction, the guilt of the accused is fashioned from spider webs. Although "whenever a culprit is caught red-handed * * * it is difficult to adopt and enforce a rule that would turn him loose," [21] it is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States,* 333 U. S. 10, 15 (1947). This Court "has had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts

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[20] "The Cleveland police had *good reason* to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. *There was testimony that he had previously been convicted on that score.*" *State v. Beck,* 175 Ohio St. 73, 74 (1963). (Emphasis supplied.)

[21] Douglas, J., dissenting in *Draper v. United States,* 358 U. S. 307, 314 (1959).

and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948).

IV.

Quite apart from the validity of the warrantless arrest and search in the instant case, the refusal of the trial court at the hearing on the motion to suppress evidence to permit defense counsel to probe the identity and reliability of the informer upon whose tip the arrest was made, raises serious and important constitutional questions.

The extent to which an accused must sacrifice important Fourth Amendment rights to protect the policeman's sources of information and the safety of his informer is a delicate and complex matter. The trial court's ruling based upon relevancy (!) missed the point entirely. And the court below resolved the question by not considering it.[22]

On the one hand, it is admitted that in some cases, the security of the informer and his effectiveness as a police instrumentality depends upon his anonymity. But where the legality of an arrest and search has been placed in issue, both minimum standards of fairness and the imperatives of the Fourth Amendment require that the accused be permitted on cross-examination to probe beneath the arresting policeman's bare assertion that he had probable cause (based upon the tip of an informer whose identity and reliability he will not disclose) to make the arrest. If permitted to cross-examine, defense counsel may find that there are no facts within the knowledge of the

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[22] "The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And *a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration* in the circumstances narrated." *State v. Beck*, 175 Ohio St. 73, 77 (1963).

arresting officer which corroborate the informant's information,[23] that the arresting officer had no prior or subsequent information as to the reliability of the informer's tip,[24] or that the informant was himself instrumental in the crime with which the accused was charged.[25] "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U. S. 53, 62 (1957).

If probable cause is an essential constitutional element to validate an arrest and search, as this Court's prior decisions in this area insist, the surest way to emasculate the requirement in practice is to deny defense counsel extensive cross-examination of the prosecution's witnesses as to the factual basis of the knowledge urged by them to justify the arrest and search. For it is not unknown for law enforcement officers to create a fictitious informer to supply the basis for an arrest and attempt to enshroud their fraud in secrecy by refusing to divulge the faceless informer's identity. E.g., *King v. United States*, 282 F. 2d 392 (4th Cir. 1960). "* * * [T]here comes a point where this Court should not be ignorant as judges of what [they] know as men." *Watts v. Indiana*, 338 U. S. 43, 52 (1949).

Moreover, apart from the necessity of disclosure of pertinent details of an informer's identity and information

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[23] Fatal to a finding of probable cause to justify an arrest or search. *Husty v. United States*, 282 U. S. 694, 701 (1931).

[24] Equally disastrous to the claim of validity of the arrest and search. *Draper v. United States*, 358 U. S. 307 (1959); *Jones v. United States*, 357 U. S. 493 (1957).

[25] Facts which would eliminate the requirement of secrecy as to the informer's identity. *Roviaro v. United States*, 353 U. S. 53 (1957); *Portomene v. United States*, 221 F. 2d 582 (5th Cir. 1955); *United States v. Conforti*, 200 F. 2d 365 (7th Cir. 1952); *Sorrentino v. United States*, 163 F. 2d 627 (9th Cir. 1947).

as a means of assuring the continued function of Fourth Amendment protections, "a further limitation on the applicability of the privilege [against disclosing the identity of informers] arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Roviaro v. United States*, 353 U. S. 53, 60 (1957).[26]

Nor can respondent take comfort from this Court's recent decision in *Rugendorf v. United States*, 376 U. S. 528 (1964), holding that, under the circumstances of that case, the name of an informer need not be disgorged at a hearing on a motion to suppress. For a careful reading of *Rugendorf* discloses the fact that the affidavit and the testimony at the pre-trial hearing demonstrated ample corroborative factual detail to support a finding of probable cause, *independent of the identity and reliability of the informer*. In the case at bar, the prosecution, in its effort to demonstrate probable cause, must sink or swim on the reliability of the informer's tip, *because the record is completely barren of any other evidence whatever* to sustain its burden of proof of the validity of the warrantless arrest.

Furthermore, it must be noted that, although petitioner in the instant case attacked the legality of his arrest

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[26] Lest it be urged that such disclosure may be compelled only at the actual trial of the accused and not by preliminary motions, the *Roviaro* court was dealing with a pre-trial motion for a bill of particulars. See also *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955).

and search at his earliest opportunity, the prosecution never produced testimony in chief showing corroboration of the facts of the informer's tip nor prior or subsequent reason to rely on such information. Since the burden of showing probable cause is upon the prosecution,[27] "courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority. Certainly the police have been warned enough in these respects * * *." *Wrightson v. United States*, 222 F. 2d 556 (D. C. Cir. 1955).

Absent evidence to sustain its burden of proof as to probable cause without the informer's information and upon its failure or refusal to lay an appropriate factual foundation for invoking the privilege against revealing the identity of its informer, the prosecution's witness should have been compelled to answer questions concerning the alleged informer and his information. Failure of the trial court to compel disclosure or, in the alternative, dismiss the charge, is violative of the Fourth Amendment and due process of law. *Roviaro v. United States*, 353 U. S. 53 (1957).

CONCLUSION.

Amici have urged the invalidity of the warrantless arrest and resulting search, the impropriety of the trial court's refusal to permit defense counsel to probe the identity and reliability of the informer whose information was the basis of the arrest, and the unconstitutionality of the warrantless arrest and search when there was ample time and opportunity to procure a warrant. For these reasons, *amici* urge this Court to reverse the conviction of the petitioner.

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[27] *Cervantes v. United States*, 263 F. 2d 800 (9th Cir. 1959).

In seeking reversal of this petitioner's conviction for a "numbers" offense, *amici* share the view of Mr. Justice Jackson:[28]

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures."

Respectfully submitted,

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[28] *McDonald v. United States*, 335 U. S. 451, 459 (1948) (concurring opinion).